

sufficient in-house resources to perform all of the functions required to do so. As Ysleta explained to SLD, “[s]tate-mandated administrative staffing limitations have forced us to look at alternative methods to manage our vast infrastructure.”<sup>73</sup> In addition, by selecting a systems integrator to be responsible for an entire project, Ysleta had the benefit of a single vendor to hold accountable for any problems that might arise.

Systems integrators provide the project management and design and engineering services that schools need to ensure that their procurement of IT products and services results in a cost-effective, operable, solution that meets the district's needs. In a 1996 report entitled "Buying Smart: State Procurement Reform Saves Millions" ("Buying Smart Report"), the National Association of State Purchasing Officials and the National Association of State Information Resource Executives identified the need for public sector entities to use flexible procurement methods that allow them to buy technology products and services—quickly and cost-effectively—while those offerings are state of the art and before they become outdated.<sup>74</sup> Accordingly, the Buying Smart Report stated that “[n]umerous state procurement offices have taken steps to re-engineer the procurement process, reducing the time it takes to procure information technology, streamlining the layers of review and oversight, allowing managers

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<sup>73</sup> Facsimile from Richard Duncan, Ysleta to Michael Deusinger, SLD, Fax Back page 3 (June 3, 2002) (Attachment 9).

<sup>74</sup> *Buying Smart: State Procurement Reform Saves Millions*, Report by National Association of State Purchasing Officials (NASPO) and the National Association of State Information Resource Executives (NASIRE) (September 1996) at 1. ("As advancements in technology occur at an amazing rate, states must position themselves to keep pace with these changes and to provide procurement methods that assure customers of receiving leading-edge information-technology products and services in a timely and cost-effective manner"), appended hereto as Attachment 13.

more discretion for small purchases [while] broadening relationships with vendors....”<sup>75</sup>

Alternative procurement models identified in the Buying Smart Report include systems integration "partnerships." Such partnerships encourage the use of bids that "briefly state the problem without the need for detailed specifications.”<sup>76</sup> In this way:

vendors, who are the subject matter experts, can use their discretion and creativity to offer an innovative solution rather than simply replicate the agency's specifications.<sup>77</sup>

Thus, strategic integration partnerships —like Ysleta's —are useful tools for state and local governments to efficiently and effectively purchase advanced technology in reliance on outside expertise that can be acquired on an "as needed basis" and that is attuned to the rapid changes and developments occurring in the technology industry.

In a 1998 update to the Buying Smart Report, the state procurement associations who authored the original report, joined by the National Association of State Directors of Administration and General Services, elaborated on their earlier findings and emphasized that “[w]ith today's shorter cycle times for new technologies, states are finding it too hard to figure things out on their own. Partnering can ease that knowledge gap.”<sup>78</sup>

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<sup>75</sup> Id. at 3.

<sup>76</sup> Id. at 8.

<sup>77</sup> Id.

<sup>78</sup> Buying Smart: Blueprint *for* Action. Report by National Association of State Purchasing Officials (NASPO), National Association of State Information Resource Executives (NASIRE), and National Association of State Directors of Administration and General Services (May 1998) at 6, appended hereto as Attachment 17.

eligible equipment—are all eligible services under the FCC's orders and the SLD's Eligible Services list.<sup>81</sup>

Finally, consistent with standard systems integration practices, the contract between Ysleta and IBM ensures a cost-effective outcome for the school because it places the risk of inefficient performance or cost increases on IBM. The contract specifically provides that the prices in the SOWs are limited to a fixed amount through "not to exceed" prices." Such an arrangement not only benefits Ysleta but it also represents a significant concession by IBM because, under the SLD's rules, no additional E-rate monies become available in a given funding year to complete the project once funding has been granted. Thus, once IBM agreed to perform the services detailed in the SOWs, IBM took on the risk of inefficient performance and the risk of incurring cost increases (those involved with waiting nearly a year before funding becomes available and subsequent cost increases associated with actual performance), while contractually promising Ysleta a not-to-exceed price and a fully functional solution.

#### **D. Price Was Properly Considered in Ysleta's Selection of IBM**

SLD denied Ysleta's funding request on the grounds that, *inter alia*, Ysleta used the wrong standard to select IBM as its service provider. According to the Further Explanation, Ysleta failed to "select IBM based on whether IBM's bid was the most cost-effective" with "low cost being the primary factor."<sup>83</sup> SLD's analysis

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<sup>81</sup> Eligible Services List (Oct. 18, 2002) at 34 (Attachment 11).

<sup>82</sup> See, *e.g.*, Network Electronics SOW, § 7; Technical Support SOW, § 2.9. ("The Services Charge stated here represents the maximum allowable charges for all services that **may** be provided under this Statement of Work."), appended hereto as Attachment 15.

<sup>83</sup> Further **Explanation** at 6

and conclusions regarding the lawfulness of Ysleta's selection process are inconsistent with applicable Commission precedent and factually incorrect. Ysleta considered price at two points in its procurement process, the second time on a stand-alone basis, independently of all other factors.

*I. The Further Explanation Misstates the Commission's Price Standard*

**As** a preliminary matter, the Further Explanation overstates the role that price must play when a school evaluates bid proposals under the Commission's rules. The relevant standard was articulated by the Commission in its Tennessee Order, where the Commission re-visited and clarified the "primary factor" standard for the role price must play in competitive bidding. Based on that clarification, the Commission concluded that Tennessee's procurement process met the "primary factor" standard. Accordingly, the Commission rejected a challenge premised on the weight assigned to price in the point system Tennessee used to evaluate bids and upheld an award to a service provider that was not the lowest bidder.

The Commission began by summarizing the price standard it first adopted in the Universal Service *Orders*.<sup>84</sup> In those Orders, the Commission had originally adopted the recommendation of the Federal-State Joint Board on Universal Service that schools be permitted to have "maximum flexibility" to take service quality into account and to choose the offering ... that meets their needs 'most effectively and efficiently,' and noted that price should be the 'primary

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<sup>84</sup> See *Universal Service Order*, 12 FCC Rcd at 9029, ¶ 481; *Fourth Reconsideration Order*, 13 FCC Rcd at 5429, ¶ 192.

factor' in selecting a bid."<sup>85</sup> But the Commission had also emphasized other factors in the Universal Service Orders "such as prior experience, personnel qualifications, including technical excellence, and management capability, including schedule compliance" to evaluate whether an offering is cost-effective.<sup>86</sup>

Applying those Orders and their underlying policies and objectives to the facts before it, the Commission in its Tennessee Order rejected arguments that the "primary factor" standard meant that price should be "the initial determining factor considered to the exclusion of other factors"<sup>87</sup> and took the opportunity to "provide useful guidance" on the factors that may be considered in evaluating competitive bids. The Commission emphasized that factors other than price, such as technical excellence, could form a basis on which to evaluate whether an offering is cost-effective. Significantly, the Commission insisted that statements from its earlier Orders must be "read as a whole"<sup>88</sup> to mean that price should be "carefully considered...to ensure that any considerations between price and technical excellence (or other factors) are reasonable."<sup>89</sup> When it applied its guidance to the specific procurement process before it, the Commission concluded that the "primary factor" test was met by Tennessee procurement regulations which required only that cost be evaluated and considered "to the

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<sup>85</sup> Tennessee Order, 14 FCC Rcd at 13737, ¶ 7 (citations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 13738, ¶ 8

<sup>88</sup> *Id.* at 13739, ¶ 9

<sup>89</sup> *Id.* See also Universal Service Order, 12 FCC Rcd at 9029, ¶ 481 (While "price should be the primary factor in selecting a bid," schools and libraries should have "maximum flexibility to take service quality into account and to choose the offering or offerings that meets their needs most effectively and efficiently ...").

greatest practicable extent“ and the contract awarded to the most “cost-effective” bidder.<sup>90</sup>

As described in Ysleta’s Request for Review, the consideration procuring agencies must give to price under Texas procurement law is consistent with this standard and should have been accepted by SLD.<sup>91</sup> If the Further Explanation is based on a conclusion that Texas law is inconsistent with the Commission’s standard in Tennessee, the decision is preempting state procurement law, which is inconsistent with the Commission’s rules and thus beyond SLD’s delegated authority.

2. Ysleta’s Price Evaluation Complied with the Commission’s Standard

Ysleta’s procurement process and its consideration of price were in full compliance with the Commission’s standard in Tennessee. Ysleta’s RFP emphasized repeatedly the importance of price in the vendor selection process, stating that it was “vitally important that the District receives value for its dollar in the other areas included in this scope of work and be able to demonstrate this to the District Board.”” The RFP went on to require bidders “to demonstrate throughout the life of the contract that the costs associated with this partnership are within normal and customary charges for the type of services provided.”<sup>93</sup>

As described in greater detail in Section I, *supra*, five bidders responded to the RFP and each bidder submitted a schedule of hourly rates for the technical

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<sup>90</sup> Tennessee Order, 14 FCC Rcd at 13740, ¶ 11

<sup>91</sup> Ysleta **Request** for Review at 26.

<sup>92</sup> Ysleta RFP, § 3.7.7 (Attachment 5).

<sup>93</sup> *Id.*

and support personnel required to complete the types of projects described in the RFP and on the Form 470.<sup>94</sup> The Further Explanation fails to address the fact that Ysleta had this important line item pricing in hand when it evaluated the bid responses. The bid responses also included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services. These are the key cost factors for evaluating bids from systems integrators since these factors determine whether a particular bidder will be able to perform tasks within budget. If a bidder's hourly rates are too high or the bidder has low rates but has a history of inefficient performance or cost overruns, then the customer is unlikely to receive cost-effective performance from that bidder.<sup>95</sup>

The *Further Explanation* attempts to make much of the fact that price is "among the least heavily weighted" of the selection criteria.<sup>96</sup> That criticism, however, is irrelevant under the facts and circumstances surrounding Ysleta's bid selection process. In particular, four of the five bidders who submitted a proposal—IBM, SBC, Compaq, and Avnet—were awarded the maximum number of points in the price category. Therefore, even if this category had been more heavily weighted, it would not have affected the outcome of the selection process. Since four bidders would still have received the same maximum score,

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<sup>94</sup> See Avnet RFP Response at 48-50, Compaq RFP Response at 38-39, **IBM** RFP Response at 79-80, i-Next RFP Response at § 3.7.7, SBC RFP Response at 51 (Attachment **6**).

<sup>95</sup> Ysleta's evaluation committee used this pricing information to evaluate the bidders along with bidder-provided information regarding the following criterion requested by the RFP: availability and quality of resources, staff development and training, project management/systems integration, technology solutions, commitment to K-12 education, district funding considerations, pricing model and cost assurances, and other vendor attributes. Solicitation Award Summary (Attachment 7).

<sup>96</sup> *Further Explanation* at 6

the price weighting would not have provided a basis for differentiating among them.

Most significantly, the *Further* Explanation ignored a crucial step in the procurement process established by Ysleta's RFP. The RFP provided that, after an initial evaluation of the RFP responses to determine the most qualified bidder, Ysleta would obtain and evaluate additional pricing information from the most qualified bidder. Pursuant to Section 1.12 of the RFP, Ysleta would then determine whether the most qualified bidder could offer a "fair and reasonable price." If Ysleta concluded that the most qualified bidder's price was not "fair and reasonable," the RFP provided that Ysleta could abandon that bidder and begin negotiations with the next most qualified bidder. The RFP specifically provided that, if Ysleta could not negotiate "a fair and reasonable price with the offeror judged most highly qualified, negotiations will be made with the offeror judged next most highly qualified until a contract is entered into."<sup>97</sup>

Thus, after IBM was "recommended" as the best qualified contractor on the basis of its RFP response, price was not only the primary factor, it was the sole and exclusive factor that determined whether IBM would ultimately be selected as the service provider. Under the terms of the RFP, IBM's initial selection as the most highly-qualified bidder was merely the beginning of a second, price-focused, evaluation phase."

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<sup>97</sup> Ysleta RFP, § 1.12 (Attachment 5); see Section I. *supra*.

<sup>98</sup> Ysleta referred to this separate price evaluation process in its June 21, 2002, response to SLD's June 14, 2002, information request. Ysleta noted that IBM had merely been "recommended" for contract award based on the RFP responses, after which Ysleta's tentative Project List was shared with IBM. See Letter from Richard Duncan, Ysleta to Michael Deusinger, SLD (June 21, 2002) (Attachment 12).



As described in more detail in Section I, above, the actual price evaluation phase proved to be substantial. Ysleta provided the Project List to IBM with a breakdown of the features, functions, and services Ysleta wanted. Based on that Project List, IBM wrote and submitted to Ysleta draft Statements of Work with associated pricing for the various E-Rate projects. The draft SOWs included prices for the products and services IBM proposed to use and/or acquire on Ysleta's behalf as the potential systems integrator and project manager for Ysleta. Ysleta's procurement personnel and information technology staff evaluated the product pricing based on their independent market research, considerable expertise, comparisons with services and pricing obtained by comparable school districts, Ysleta's prior experience in earlier funding years, and the rate schedules previously provided in IBM's RFP response." Ysleta concluded that IBM's pricing was reasonable but Ysleta's Project List was too ambitious for its budget so it directed IBM personnel to prepare modified SOWs based on a reduced scope of work.<sup>100</sup> IBM then provided modified draft SOWs with reduced prices to Ysleta. After evaluating the prices in the new draft SOWs and concluding that the prices were fair and reasonable, Ysleta selected IBM as its service provider and executed a contract for the applicable services.

Ysleta's obligation to contribute its own funds to any E-rate project also gave the District substantial incentive to minimize costs and negotiate a fair and reasonable price. Specifically, Ysleta is required to pay ten percent of the cost of eligible products and services, and the entire cost of the ineligible products and

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<sup>99</sup> Ysleta Request for Review at 8.

<sup>100</sup> *Id.* at 8.

services necessary to make the eligible products and services functional (e.g., personal computers, electrical upgrades). In fact, Ysleta is obliged to contribute \$15.7 million of its own resources to fund such ineligible but necessary items.”

This co-payment obligation provides a poor school district such as Ysleta with an enormous incentive to obtain a cost-effective price from its vendors. As the Commission recognized in its *Tennessee Order*:

[T]he Administrator generally need not make a separate finding that a school has selected the most cost-effective bid. Such a finding is not generally necessary because a school has an incentive to select the most cost-effective bid, even apart from any procurement requirements, because it must pay its pro rata share of the cost of the services requested.”

In short, Ysleta’s significant financial contribution to the project provided a powerful incentive to select the most cost-effective service provider.

**E. Ysleta’s Procurement Methodology Keeps Prices Competitive Even After the Contract is Finalized**

Ysleta’s contract with IBM ensures that the contract prices are subject to competitive pressure and the requirements of state procurement law even after the contract is finalized. As noted earlier, for all products purchased pursuant to the SOWs, the General Contract provides that Ysleta could direct IBM to particular product vendors and require that products be acquired in accordance with Texas procurement law.<sup>103</sup>

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<sup>101</sup> Facsimile from Richard Duncan, Ysleta to Michael Deusinger, SLD, Carol J. Walters Letter (June 3, 2002) (Attachment 9).

<sup>102</sup> Tennessee Order, 14 FCC Rcd at 13739, ¶ 10

<sup>103</sup> See page 9, *supra* (citing General Contract, “Procurement of Products”).

Pursuant to this clause, if Ysleta is dissatisfied with any of IBM's equipment prices, it can demand that these products be procured on Ysleta's behalf by IBM from another vendor, and in compliance with Texas procurement law. Thus, Ysleta's contract provides the district with an important means of obtaining the most favorable prices for products.

For services and products, each of the SOWs contains a clause allowing Ysleta to unilaterally terminate the contract for any reason, including dissatisfaction with the bottom line price, even if Ysleta receives E-rate funding for the services: "Neither party will incur obligations under the portion of the Agreement represented by this Statement of Work if the District chooses not to pursue the project, even though a full or partial FUNDING COMMITMENT has been received."<sup>104</sup> This clause allows Ysleta to substitute another provider for IBM if it locates a service provider that can offer the services on a more cost-effective basis. Moreover, even if Ysleta never exercises its option to terminate, the credible threat of termination created by the contract provision provides Ysleta with critical leverage in any post-contract determinations of the scope and price of services.<sup>105</sup>

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<sup>104</sup> See, e.g., Network Electronics SOW, § 7; Technical Support SOW, § 2.9 (Attachment 15).

<sup>105</sup> In addition to the contract provisions, the SLD's guidelines allow a school district to change service providers as an "Operational SPIN Change." This separate mechanism gives Ysleta the opportunity to change vendors because of dissatisfaction with price or quality.

### III. THE *FURTHER EXPLANATION* MISCHARACTERIZES THE CONTRACT AND THE RFP RESPONSE IN ITS DISCUSSION OF INELIGIBLE AND FREE SERVICES

The Further Explanation's discussion of ineligible and free services does not provide a basis for IBM challenge or Commission review of the funding denial because the SLD emphasized that it was "not denying these funding requests at this time on the grounds that they include a prohibited proportion of ineligible services."<sup>106</sup> In the course of its discussion, however, the *Further Explanation* fundamentally mischaracterizes the contract documents and IBM's RFP response, an error that the Commission should not perpetuate.

Like any company seeking to enhance its image (and hoping to expand its potential relationship) with a prospective customer, IBM included in its RFP response not only descriptions of the particular services Ysleta sought but also generic descriptions of the global set of services the company is capable of providing. The *Further Explanation* misinterprets these descriptions of IBM's capabilities as offers by IBM to provide ineligible services to Ysleta and obtain E-rate funding for them. That is an unreasonable interpretation of the matter and inconsistent with the facts.

The *Further Explanation* also erroneously states that: "[t]he General Contract between Ysleta and IBM specifies that IBM would be paid for the services specified in ... IBM's Proposal." In fact, the General Contract incorporates only the RFP, the Contractor's Appendix to the RFP, the IBM

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<sup>106</sup> *Further Explanation* at 9.

Customer Agreement, and the SOWs.<sup>107</sup> The General Contract does not incorporate IBM's RFP Response nor does it state that IBM will be paid for services identified in IBM's Proposal.

Accordingly, the Further Explanation's non-decisional dicta in this area is inconsistent with the facts.

#### **IV. IBM DID NOT OFFER TO WRITE YSLETA'S TECHNOLOGY PLAN AFTER THE FCC FORM 470 WAS FILED**

The Further Explanation seizes upon descriptions in IBM's RFP response of its ability to assist schools in the development of their technology plans and suggests that this means Ysleta and IBM were re-writing Ysleta's technology plan after Ysleta filed its Form 470.<sup>108</sup> Because this conclusion is neither consistent with the factual record nor the Commission's rules and orders, it should be reversed.

SLD's conclusion that IBM either offered to rewrite, or did rewrite, Ysleta's Technology Plan is based on IBM's RFP response in which IBM stated only that it "can help develop your technology plan ...."<sup>109</sup> Not only did IBM not *offer* to rewrite Ysleta's Technology Plan after the Form 470 was filed, IBM in fact did not engage in any such re-writing; Ysleta's Technology Plan was completed in May

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<sup>107</sup> General Contract at 1 (Attachment 8). The Further Explanation also refers to a "General Contract at 1" stating that "**IBM** would be paid for the services specified in the RFP, IBM's Proposal, and the Statements of Work." *Id.* at 8. In addition, the Further Explanation erroneously states that the General Contract was signed on January 17, 2002, and January 18, 2002. *Id.* at 2. The Further Explanation appears to refer to the wrong document, as neither the quoted language nor the date of January 18, 2002, appear in the General Contract.

<sup>108</sup> Further Explanation at 9-10

<sup>109</sup> *Id.* at 9 (citing RFP Response at 67).

2001, five months before it filed its FCC Form 470 in October 2001 and six months before IBM provided its RFP response.

Moreover, the statement in IBM's RFP response is no more than a standard description of IBM's capabilities and expertise. It cannot reasonably be interpreted as an agreement to write Ysleta's Technology Plan, particularly since the contract does not refer to any such service.

## **V. YSLETA AND IBM DID NOT SEEK TO INAPPROPRIATELY MAXIMIZE FUNDING SUPPORT**

The Further *Explanation* also charges that "the overriding goal of the IBM-Ysleta relationship is to 'maximize the **SLD** funding,' not necessarily to promote educational goals that have been clearly defined in a technology plan."<sup>110</sup> This allegation misinterprets the record and attributes illicit motivations to Ysleta and IBM where none exist.

The Commission has previously recognized that there is nothing sinister about schools seeking to maximize the funding they obtain to deploy eligible products and services nor is doing so inherently inconsistent with the Schools and Libraries Funding Mechanism. Indeed, SLD rules that discouraged eligible recipients from seeking all of the funding for which they qualify would be inconsistent with the statutory objectives in the Communications Act and counterproductive for the whole program. As the Commission has repeatedly observed, even the schools who most aggressively pursue funding must pay their pro rata share of the overall prediscount price. This payment obligation

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<sup>110</sup> *Further Explanation* at 10.

provides powerful incentives for schools "to show fiscal constraint"" and obtain only the products and services they can use. Thus, the Tennessee Order pointed out that "maximizing federal support" is "not prohibited by our rules,"<sup>112</sup> and refused to reject an applicant's bidding process that rewarded bids designed to maximize federal support.

Moreover, the trade press is full of articles promising tips on how applicants can maximize their share of E-rate funding. Most recently, for example, an article in *eSchool News*online cited "four simple—but legal strategies for maximizing your share of the \$2.25 billion in funding that is available."<sup>113</sup> Among these simple strategies is for "[l]arge school divisions or library systems with relatively low discount rates [to] create a consortium with a single high discount school, resulting in a higher discount for the large entity."<sup>114</sup> Similarly, schools and libraries share strategies for increasing the subsidies they obtain from the program. The Virginia Department of Education, for example, has advertised a videoconference workshop entitled, "Maximizing E-Rate Discounts."<sup>115</sup>

Finally, Ysleta's actions are not those of a school district attempting to maximize funding. In fact, as noted on pages 8-9, *supra.*, Ysleta reduced the scope of its SOWs in order to save money. Thus, the incentive created by

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<sup>111</sup> Tennessee Order, 14 FCC Rcd at 13740, ¶ 13.

<sup>112</sup> *Id.* at 13740, ¶ 14

<sup>113</sup> Greg Weisiger, "How to maximize your eRate discounts for Year Six," *eSchool News*online (Dec. 1, 2002) .  
[www.eschoolnews.com/news/showStory.cfm?ArticleID=4111&ref=wo](http://www.eschoolnews.com/news/showStory.cfm?ArticleID=4111&ref=wo).

<sup>114</sup> *Id.*

<sup>115</sup> E-Rate Central: New York State *E-Rate* News, "E-Rate News for the Week of October 7 through October 11, 2002." [www.e-ratecentral.com/archive/News2002/weekly\\_news\\_215.htm](http://www.e-ratecentral.com/archive/News2002/weekly_news_215.htm).

requiring school districts to pay a pro rata portion of their E-rate funded goods and services, and pay for all of their related, unsubsidized goods and services, is a powerful disciplining force that forecloses imprudent or unnecessary expenditures by schools. Given such built-in incentives against overspending, the *Further Explanation* would penalize schools for doing no more than seeking the amount of funding to which they are entitled.

## **VI. YSLETA USED A NEUTRAL SELECTION PROCESS TO CHOOSE IBM**

The *Further Explanation* speculates that IBM may have improperly influenced Ysleta's selection process based on SLD's review of numerous RFPs which bear "striking similarities." According to SLD, this uniformity "creates an inference that [IBM] is involved before the RFP" is issued and from such prior involvement SLD "reasonably could infer that IBM has unduly influenced the selection process in IBM's favor."<sup>116</sup> Such inferences would, in fact, be patently unreasonable and contradicted by the record in this case.

First, SLD cannot reasonably infer that IBM is the cause of any uniformity among school district's RFPs. As Ysleta makes clear in its Request for Review, the RFP used by Ysleta was in fact based in large part on an RFP issued by another school district, *not* by IBM.<sup>117</sup> Moreover, and contrary to the suggestion of the *Further Explanation*, the sharing of draft RFPs by school districts is neither improper nor inconsistent with the FCC's rules. In fact, the Commission should encourage it as a very cost-effective and efficient way for schools to develop

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<sup>116</sup> *Further Explanation* at 10.

<sup>117</sup> See Ysleta Request for Review at 36.



**RFPs**, rather than tolerating a requirement that every school district re-invent the wheel by drafting custom contracting documents for standardized or uniform aspects of the solicitation process. The efficiencies inherent in such “best practices” by schools should be encouraged by the FCC, not penalized. In the instant case, Ysleta properly conserved its administrative resources by re-using many portions of an RFP used by the neighboring El Paso Independent School District. There is nothing inappropriate about such sharing. It is merely an attempt by Ysleta to operate efficiently by making appropriate use of existing documentation.

SLD’s assertion that it is entitled to infer bias in Ysleta’s vendor selection process simply because of language similarities in RFPs issued by different school districts is also patently unreasonable. Where those similarities are attributable to materials distributed by service providers, it is entirely permissible, if not required, for service providers to assist school districts in the preparation of their RFPs.<sup>118</sup> Moreover, the fact that four other bidders responded to the Ysleta RFP is powerful evidence that the RFP was in fact neutrally drafted. Therefore, the SLD’s conclusion that the entire selection process was tainted is not supported by the factual record.

Finally, the Further *Explanation* ignores the long-standing and highly-developed state procurement procedures for addressing claims that a bidder selection process or solicitation documents are biased. If another bidder

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<sup>118</sup> See **SLD** Service Provider *Manual*, Chapter 5 (“The FCC understands that applicants sometimes need to seek assistance from service providers in developing RFPs. Such assistance is permissible even if the service provider plans to submit a bid in response to that RFP as long as the service provider’s assistance is neutral.”).  
[www.sl.universalservice.org/vendor/manual/chapter5.doc](http://www.sl.universalservice.org/vendor/manual/chapter5.doc)

believes that an RFP or other solicitation document reflects undue vendor influence and will produce a biased procurement process, the appropriate, most effective, and expeditious remedy is a bid protest filed pursuant to state procurement law. Indeed, the Ysleta RFP, at Section 1.15, specifically addresses this very issue. It states: “Any Offeror who is aggrieved with regard to this procurement, may protest to the Contracting Officer.... The Contracting Officer shall promptly issue a determination relating to the protest.” And, as Ysleta points out in Section IV.I.C of its Request for Review, any bidder in the Ysleta procurement who believed the RFP was biased had a wide array of procedural options for challenging the procurement.<sup>119</sup> Because the Commission has made the policy decision to largely defer to state procurement law in the context of bid selection criteria, it should not allow the SLD to push these state procedures aside by concluding from mere similarities that a process is biased.

## **VII. YSLETA STUDENTS SHOULD NOT BE PENALIZED BY RETROACTIVE APPLICATION OF NEW OPERATING PROCEDURES**

SLD’s abrupt decision to reject funding for systems integration/technical partnerships between service providers and school districts is unfair to students in the nation’s poorest school districts, who will be relegated to the wrong side of the digital divide. Ysleta’s students in particular—86 percent of whom qualify for subsidized lunches—should not be deprived of much-needed technology assistance by SLD’s newfound and unauthorized interest in overriding state and local procurement requirements and practices

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<sup>119</sup> Ysleta Request for Review at 20-21.

If SLD has now determined that its funding decisions will be adversely influenced by previously accepted and widely-used competitive bidding approaches, its new standard should be clearly articulated and applied prospectively. An *ad hoc*, retroactive prohibition of these practices will unfairly penalize some of the nation's poorest students, whose school districts reasonably relied on precedent to prepare their RFPs and choose their E-rate service providers. Moreover, any attempt by SLD to override the practices and policies of state and local procurement authorities or deviate from the standard articulated by the Commission in the Tennessee Order, would exceed the limited authority delegated to the SLD by the FCC. Since the Commission expressly declined to pre-empt state and local procurement law, neither it nor the SLD can do so now absent a rulemaking to change the regulations. Instead of applying a new operating procedure to Year 5 applications, the SLD should update its Service Provider Manual accordingly, and apply new guidelines on a prospective basis only.<sup>120</sup>

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Prospective application is the fairest procedural course because applicants will be on notice of the new guidelines and have an equal opportunity to structure their bidding process accordingly. See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence ...”).

## VIII. CONCLUSION

For the aforesated reasons, the Commission should reverse the SLD's decision to deny Ysleta funding in the further Explanation.

Respectfully submitted,

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January 30, 2003

Certificate of Service

I, Michaelleen I. Williams, hereby certify that true and correct copies of the preceding Request for Review of International Business Machines Corporation ("IBM") was served this January 30, 2003 via hand delivery upon the following parties:

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